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Attorneys for Defendant  
JPMORGAN CHASE BANK, N.A.

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN FRANCISCO DIVISION**

KIMBERLY BENSON; KARIMDAD  
BALOCH; and NEERJA JAIN  
GURSAHANEY, individually and on  
behalf of all others similarly situated,

Plaintiffs,

v.

JPMORGAN CHASE BANK, N.A.,  
individually and as successor in interest  
of WASHINGTON MUTUAL, INC.,

Defendant.

CASE NO.: CV 09-5272 (EMC)

**DEFENDANT JPMORGAN CHASE  
BANK, N.A.'S:**

(1) **NOTICE OF MOTION AND  
MOTION TO TRANSFER  
VENUE; AND**

(2) **MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT THEREOF**

DATE: February 3, 2010  
TIME: 10:30 a.m.  
PLACE: Courtroom C

*[Declaration of Phillip J. Eskenazi, Request  
for Judicial Notice and [Proposed] Order  
Filed Concurrently Herewith]*

Complaint Filed: November 5, 2009

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** that at 10:30 a.m. on February 3, 2010 or as soon thereafter as the matter may be heard in Courtroom C of the above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, California, Defendant JPMORGAN CHASE BANK, N.A. (“Chase”) will, and hereby does, move the Court for an order transferring the case to the Northern District of Texas pursuant to 28 U.S.C. § 1404(a) and the doctrine of judicial comity.

This Motion is based upon the grounds that the issues raised in Plaintiffs’ complaint are the subject of two actions in the United States District Court for the Northern District of Texas before the Honorable Reed O’Connor, United States District Judge. The same issues decided and to be decided by Judge O’Connor necessarily will be considered by this Court if this case proceeds. In addition, the convenience of the parties and witnesses, and the interests of justice warrant the transfer of this action to the Northern District of Texas under 28 U.S.C. § 1404(a).

This Motion is based upon this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the Request for Judicial Notice and

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1 Declaration of Phillip J. Eskenazi filed concurrently herewith, all pleadings and papers  
2 on file, and upon such oral argument as may be made at the hearing on this Motion.

3  
4 Dated: December 23, 2009

By: /s/ Phillip J. Eskenazi

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

This case arises out of the alleged Ponzi scheme that is the subject of two actions in the United States District Court for the Northern District of Texas (the “Texas Court”) before the Honorable Reed O’Connor, United States District Judge. The first is a receivership proceeding relating to the primary alleged wrongdoers. *Securities and Exchange Commission v. Millennium Bank, et al.*, Case No. 7:09-CV-00050-0 (the “Receivership Action.”). In that case, the SEC alleges that the Ponzi scheme victims were induced to purchase bogus certificates of deposit from Millennium Bank by William J. Wise, Kristi Hoegel, Jacqueline Hoegel, individually and on behalf of UT of S, LLC, and affiliated persons and entities (collectively, “UTS”).

The second proceeding in the Texas Court is a class action suit filed against Chase in April 2009 on behalf of the alleged Ponzi scheme victims (the “Gruenberg Action”) by Anne Marie Litson-Gruenberg. The plaintiff in the Gruenberg Action alleges that Chase is liable for the victims’ losses because, according to the plaintiff, Washington Mutual Bank (“WaMu”) aided and abetted UTS in the fraudulent activity by providing banking services.<sup>1</sup> On December 16, 2009, Judge O’Connor dismissed the Gruenberg Action for failure to state a claim, but he retains jurisdiction over the case.

As more fully described below, federal comity, the convenience of the parties and witnesses, and the interests of justice warrant the transfer of this action to the Texas Court. Accordingly, Chase seeks an order of this Court doing so.

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<sup>1</sup> Under the terms of a September 25, 2008 agreement between Chase and FDIC as receiver for WaMu, Chase acquired certain assets of WaMu. Chase, however, is *not* the successor of WaMu.

## II. STATEMENT OF FACTS

On March 26, 2009, the SEC filed the Receivership Action against Millennium Bank, United Trust of Switzerland, S.A., UT of S, LLC, Millennium Financial Group, William J. Wise, Kristi Hoegel, Jackie Hoegel, Phillipe Angeloni, Brijesh Chopra, United T of C, LLC, Sterling I.S., LLC, Matrix Administration, LLC, Jasmine Administration, LLC, Daryl C. Hoegel, Ryan Hoegel, Lynn P. Wise, and Laurie H. Walton (the “Receivership Defendants”). Request for Judicial Notice (“RJN”), at Exh. 1; *see also* the Docket Report, RJN at Exh. 2. On March 25, 2009, Judge O’Connor entered an order appointing Richard B. Roper (“Receiver”) of the Thompson & Knight law firm in the Northern District of Texas as receiver over all of the assets of UTS. RJN at Exh. 3 and, as amended, at Exh. 4. In that same order, Judge O’Connor enjoined the filing of claims against all Defendants in the Receivership Action in courts other than the Texas Court. RJN at Exh. 3, at p. 7; *see also* RJN at Exh. 5 (temporary restraining order). The Receivership Action remains pending before Judge O’Connor.

The Receiver has seized all documents and materials, including cell phones and computers, from the Receivership Defendants’ offices in Napa, California and Raleigh, North Carolina, and shipped them to the offices of Thompson & Knight in the Northern District of Texas. RJN at Exh. 6, at p. 10. Those materials include 5.46 terabytes of data. *Id.* To date, the Receiver has received 1563 claims from 819 investors, asserting claims for more than \$119,188,545. *Id.* at 4.

The Receiver has served document subpoenas on Chase and several other financial institutions and he either has received or anticipates receiving soon documents from more than 20 entities. *Id.* at p. 25-26. The Receiver has indicated that he will make those documents available to attorneys who represent investors pursuing claims against WaMu, among others, upon receipt of a subpoena. RJN at Exh. 8.



1 Finally, the Receiver has retained the forensic accounting firm of Litzler,  
2 Segner, Shaw & McKenney, L.P. (“LSS&M”) in Dallas, Texas. *Id.* at p. 11. LSS&M  
3 is to provide a comprehensive view of the Ponzi scheme. *Id.*

4 On April 15, 2009, Anne Marie Litson-Gruenberg filed the Gruenberg Action in  
5 the Texas Court against Chase, Case No. 7:09-CV-056-0. The Gruenberg Action also  
6 was assigned to Judge O’Connor. Copies of the original and amended complaints are  
7 included in the RJN at Exhs. 8 and 9.

8 In the Gruenberg Action, the plaintiff alleged that UTS fraudulently induced her  
9 late husband to invest in a Millennium Bank CD. She brought claims against Chase  
10 under California law, on behalf of herself and a putative class of the other victims of  
11 the Ponzi scheme, for aiding and abetting fraud, aiding and abetting breach of  
12 fiduciary duty, breach of fiduciary duty, constructive fraud, negligence, and  
13 negligence per se. In that regard, the plaintiff alleged that Chase either knew or  
14 should have known that UTS was operating a Ponzi scheme and provided substantial  
15 assistance in connection therewith.

16 On December 16, 2009, Judge O’Connor dismissed the Gruenberg Action for  
17 failure to state a claim. RJN at Exh. 10.

18 On November 5, 2009, Plaintiffs filed the present action. Like the plaintiff in  
19 the Gruenberg Action, Plaintiffs bring claims against Chase under California law for  
20 aiding and abetting fraud and breach of fiduciary duty, among others. A comparison  
21 of the complaint in this action to the amended complaint in the Gruenberg Action  
22 reveals that the allegations against Chase substantively are identical -- both allege in a  
23 conclusory fashion that Chase knew or should have known of the Ponzi scheme and  
24 provided substantial assistance relating to the fraud.

25 According to the Receiver, he is monitoring the Gruenberg Action. RJN at  
26 Exh. 11, at p. 2. He also has issued a statement about the Gruenberg Action. RJN at  
27 Exh. 12.

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Recognizing the similarities in the cases, on December 9, 2009, Plaintiffs filed a Motion for Transfer and Consolidation before the Judicial Panel on Multidistrict Litigation. RJN at Exh. 13. In that motion, Plaintiffs requested that the Panel transfer the Gruenberg Action case to the Northern District of California for coordinated or consolidated proceedings. *Id.* The MDL Panel, on December 18, 2009, denied Plaintiffs' motion as moot. RJN at Exh. 14.

### III. ARGUMENT

#### A. The Court should transfer this action under the doctrine of federal comity.

Under the doctrine of federal comity, a district court should decline jurisdiction over an issue that properly is before another district court. *Kertest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 185-86 (1952). The doctrine is designed to promote judicial efficiency by avoiding an unnecessary burden on the federal judiciary and by avoiding duplicative or conflicting judgments. *Alltrade, Inc. v. Uniweld Products, Inc.*, 946 F.2d 622, 625 (9th Cir. 1991). The purpose of the comity principle is of "paramount importance," and it "should not be disregarded lightly." *Peak v. Green Tree Financial Servicing Corp.*, 2000 WL 973685, at \*1 (N.D. Cal. July 7, 2000) (citing *Church of Scientology of California v. U.S. Dep't. of the Army*, 611 F.2d 738, 750 (9th Cir. 1979)); *Pacesetter Systems, Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982).

The Receivership Action and Gruenberg Action were filed months before the present case. Although Judge O'Connor has dismissed the Gruenberg Action, he retains jurisdiction over the case; the plaintiff may seek relief under FED. R. CIV. P. 59; and the plaintiff may appeal. The Receivership Action remains active.

Moreover, the parties are similar. Because this case is a class action, the Court is to compare the proposed classes, not the class representatives. *Weinstein v. MetLife, Inc.*, 2006 WL 3201045, at \*4 (N.D. Cal. Nov. 6, 2006). In the Gruenberg Action, the plaintiff sought to certify a class "consisting of all those who invested in

1 the [Millennium Bank] Ponzi scheme . . . .” RJN at Exh. 9, at p. 3. In the present  
 2 case, Plaintiffs seek to certify a class of all persons “who, between July 1, 2004 to the  
 3 present, purchased or otherwise acquired a purported Certificate of Deposit (“CD”)  
 4 from or through Millennium, UTS and/or one of the Nevada LLCs.” Comp. at 28.  
 5 Thus, the proposed classes are substantively identical.

6 Although Chase is not a party to the Receivership Action, all of the Defendants  
 7 in that proceeding are identified in this action as “unnamed Co-Conspirators.”  
 8 According to Plaintiffs, they are not named defendants because of Judge O’Connor’s  
 9 receivership order enjoining litigation against them, unless filed in the Texas Court.  
 10 Comp. at 9-10. Plaintiffs, however, describe the unnamed co-conspirators as potential  
 11 parties, and they reserve their rights against those individuals and entities. *Id.* If this  
 12 case were transferred to the Texas Court, Judge O’Connor could decide how, if at all,  
 13 Plaintiffs’ claims against Chase should proceed along with Plaintiffs’ claims against  
 14 the alleged co-conspirators. *See, e.g., Papagni v. Hammersmith Trust, L.L.C.*, 2000  
 15 WL 630901 (N.D. Cal. May 9, 2000) (recognizing the authority of another federal  
 16 court to enjoin actions in other districts in connection with a receivership).

17 Next, the issues in this case and in the Gruenberg Action -- whether Chase  
 18 knew of the alleged wrongdoing by its customer(s) and whether Chase substantially  
 19 assisted its customer(s) with the Ponzi scheme -- are identical. The issues in the  
 20 Receivership Action -- whether and to what extent the Receivership Defendants  
 21 defrauded the investors -- also are at issue in the present case. If the present case  
 22 proceeds, inconsistent judgments are possible on all of these issues, and the rights of  
 23 the Ponzi scheme victims could be impacted disparately.

24 Moreover, the docket sheet from the Receivership Action (RJN at Exh. 2)  
 25 shows that the case is and has been very active, and Judge O’Connor has analyzed and  
 26 made rulings related to many aspects of the alleged Ponzi scheme. *See, e.g.,*  
 27 *Persepolis Enterprise v. United Parcel Service, Inc.*, 2007 WL 2669901, at \*2 (N.D.  
 28 Cal. Sept. 7, 2007) (case transferred to the Northern District of Alabama “where the

[Alabama] court already has a deep familiarity with the facts . . . [and] is in a better position to determine whether the two cases should proceed separately.”). In the Gruenberg Action, Judge O’Connor has analyzed and applied the legal issues under California law arising from WaMu’s alleged participation in the Millennium Bank Ponzi scheme. Accordingly, he obviously has a thorough understanding of the facts and applicable law.

The same issues decided and to be decided by Judge O’Connor necessarily will be considered by this Court if this case proceeds. Sound judicial administration, efficiency, and the risk of inconsistent judgments dictate that those issues not be considered by two courts. *See Alltrade*, 946 F.2d at 625.

Finally, Plaintiffs have recognized the propriety of having this case resolved in a single forum by filing their Motion for Transfer and Consolidation before the MDL Panel. Although that motion was unsuccessful, Plaintiffs acknowledge that “assigning a single judge [to the investors’ claims] will insure that the legal issues raised in this case . . . are addressed in a consistent manner.” RJN at Exh. 13, at p. 4. The only way to insure that all legal issues are addressed in a consistent manner is to transfer this case to the Texas Court.

**B. Convenience and the interest of justice favor transfer to the Texas Court.**

28 U.S.C. § 1404 allows the Court to transfer an action to any district where it might have been brought for the convenience of the parties and witnesses, in the interest of justice. In this regard, Chase must show: (1) the existence of an adequate alternative forum;<sup>2</sup> and (2) that the balance of private and public interest factors weighs in favor of transfer. *BRC Group, LLC v. Quepasas*, 2009 WL 2424669, at \*4 (N.D. Cal. Aug. 7, 2009) (*citing Piper Aircraft v. Reyno*, 454 U.S. 235 (1981)). The

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<sup>2</sup> There is no question that the present action may have been brought in the Texas Court. Chase does business in the Northern District of Texas, and it did not object to venue in the Gruenberg Action, nor will it in the present action.

purpose of Section 1404 is to “prevent the waste of time, energy, and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense.” *Milton v. True Position, Inc.*, 2009 WL 323036, at \*1 (N.D. Cal. Feb. 9, 2009). The balance of interests here favors transfer.

**1. The interest of justice favors transfer.**

“The pendency of related actions in the transferee forum is a significant factor in considering the interest of justice factor.” *Jolly v. Purdue Pharma, L.P.*, 2005 WL 2439197, at \*2 (S.D. Cal. Sept. 28, 2005). As described above, the same legal issues exist in the present action and the Receivership and/or Gruenberg Actions.

Transferring this case to the Texas Court will avoid the wastefulness and the possibility of inconsistent results.

**2. Convenience of the parties and witnesses supports transfer.**

According to the Complaint, only two of the Plaintiffs are California residents. Although a plaintiff’s choice of forum ordinarily is afforded deference, that deference is reduced in class action cases. *Lou v. Belzberg*, 373 F.2d 530, 544 (9th Cir. 1987). The Northern District of California no doubt would be more convenient for two of the Plaintiffs individually, but the convenience analysis should focus on the investors, not the named Plaintiffs, because Plaintiffs’ claims focus on UTS’ statements to all investors generally. *Jolly*, 2005 WL 2439197, at \*2. (Although the *Jolly* plaintiff’s purchase of OxyContin allegedly took place within this district, the plaintiff’s claims more broadly implicated the defendant’s representations to “the public.”). The Ponzi scheme victims likely are spread across the United States, if not the world. Access to documents and witnesses is more convenient in Texas. The Receiver has gathered relevant documents, cell phones, and computers, including those originally in California, and compiled them in his offices in the Northern District of Texas.

The Receiver has indicated that, although he will require compliance with appropriate legal requirements, he will not withhold information or documents properly requested. RJN at Exh. 7, at p. 1. He specifically references document

1 requests for “investors pursuing claims against Defendants’ service providers  
 2 (including Google and WaMu).” *Id.* Thus, the parties in the present action will need  
 3 to issue subpoenas for documents from the Texas Court, pursuant to FED. R. CIV. P.  
 4 45(a)(2). Disputes relating to those subpoenas necessarily will be addressed to the  
 5 Texas Court. Rule 45(c).

6 Dallas, Texas is a more convenient forum for the majority of the witnesses.<sup>3</sup> It  
 7 is centrally located, and its airport is served by direct flights from most American and  
 8 many foreign cities. The witnesses at trial will be one or more of the Receivership  
 9 Defendants, Plaintiffs, other Ponzi scheme investors, LSS&M, and representatives of  
 10 Chase. The Texas Court has jurisdiction over the Receivership Defendants. LSS&M  
 11 is located in Dallas, Texas. The victims of the alleged Ponzi scheme, of whom more  
 12 than 800 have filed claims in the Receivership Action, likely are from all over the  
 13 United States and foreign countries. Although Plaintiffs and some other witnesses are  
 14 from California, Dallas is the most convenient forum for the witnesses as a whole.<sup>4</sup>

15 Judicial caseload statistics also support transfer of this action to the Texas  
 16 Court. *See Western Oilfields Supply Co. v. Goodwin*, 2009 WL 161068, at \*4 (E.D.  
 17 Cal. Jan. 22, 2009) (considering case load statistics in connection with § 1404  
 18 motion). According to the latest Federal Judicial Caseload Statistics summary  
 19 ([www.uscourts.gov/caseload2009/contents.html](http://www.uscourts.gov/caseload2009/contents.html)), the Texas Court has 325 pending  
 20 cases per Judgeship compared to 634 in this Court.

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 27 <sup>3</sup> Although the Receivership and Gruenberg Actions are pending in the Wichita Falls  
 Division of the Northern District of Texas, Judge O’Connor presides in Dallas.

28 <sup>4</sup> Chase will not object to making its California witnesses available in Texas.

1 **IV. CONCLUSION**

2 For the foregoing reasons, Chase respectfully requests that the Court transfer  
3 this case to the Northern District of Texas. Finally, Chase respectfully requests that  
4 the Court grant it such other and further relief to which it may show itself justly  
5 entitled.

6  
7 Dated: December 23, 2009

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